

Issue: Separation from State (unable to meet work conditions); Hearing Date: 02/22/17; Decision Issued: 03/10/17; Agency: VSP; AHO: Carl Wilson Schmidt, Esq.; Case No. 10927; Outcome: Full Relief; **Attorney's Fee Addendum issued 03/30/17 awarding \$3,484.60.**



COMMONWEALTH of VIRGINIA

Department of Human Resource Management

OFFICE OF EMPLOYMENT DISPUTE RESOLUTION

DECISION OF HEARING OFFICER

In re:

Case Number: 10927

Hearing Date: February 22, 2017

Decision Issued: March 10, 2017

PROCEDURAL HISTORY

On July 25, 2016, the Agency informed Grievant he was being removed from employment effective October 1, 2016. On August 22, 2016, Grievant timely filed a grievance to challenge the Agency's action. On November 18, 2016, the Office of Employment Dispute Resolution issued Ruling 2017-4424 qualifying the grievance for hearing. On December 21, 2016, the Office of Employment Dispute Resolution assigned this appeal to the Hearing Officer. On February 22, 2017, a hearing was held at the Agency's office.

APPEARANCES

Grievant
Grievant's Counsel
Agency Party Designee
Agency's Representative
Witnesses

ISSUES

1. Whether Grievant's removal was in accordance with State and Agency policy?

BURDEN OF PROOF

The burden of proof is on the Grievant to show by a preponderance of the evidence that the Agency acted contrary to policy and that the relief he seeks should be granted.¹ Grievance Procedure Manual (“GPM”) § 5.8. A preponderance of the evidence is evidence which shows that what is sought to be proved is more probable than not. GPM § 9.

FINDINGS OF FACT

After reviewing the evidence presented and observing the demeanor of each witness, the Hearing Officer makes the following findings of fact:

The Virginia State Police employed Grievant as a Special Agent in one of its Divisions. Grievant carried a weapon and could exercise his duties with the force of law. Grievant did not participate in the Virginia Sickness and Disability Program.

The Agency entered into a contract to receive services from an organization of medical providers to complete fitness for duty evaluations. Dr. S was one of the mental health professionals in that organization.

Dr. S is licensed as a psychiatric nurse practitioner. She holds a Ph.D. She conducts annually between 140 and 150 fitness for duty evaluations. Dr. S is not a licensed psychiatrist, psychologist, or physician.

Dr. S’s practice was to send a report to the Agency after completing a fitness for duty evaluation. She did not keep a copy of the report. She destroyed her notes after drafting the report.

On February 16, 2017 and February 17, 2016, Grievant made statements to two First Sergeants describing his stress level and state of mind. Grievant indicated a house he owned had been damaged and he was taking two steroids that made his hands shake. He said it was not a good time for him to come to work and not a good time for him to have a gun. Grievant referred to himself in the third person which seemed odd to the two First Sergeants. Grievant described several traumatic events in his career including standing on the side of a road with blood on his hands from a Trooper who was murdered during a traffic stop. The two First Sergeants suggested Grievant receive help under the Employee Assistance Program. Grievant declined. Both First Sergeants concluded Grievant might be in crisis.

¹ Grievant argued that the Agency’s action was disciplinary in nature and, thus, the burden of proof should be on the Agency. This argument was not supported by the evidence. The Agency did not separate Grievant from employment as a form of discipline.

On February 19, 2016, Grievant was placed on leave with pay. The Agency began its process to evaluate Grievant's fitness for duty.

Grievant met with Dr. S for his first fitness for duty examination. Grievant answered the questions Dr. S asked. Dr. S concluded that Grievant was fit for duty and informed the Agency of her findings in a report. During the hearing, Dr. S could not recall the basis for her conclusion that Grievant was fit for duty.

After receiving the first report, the Agency provided Dr. S with additional information. Dr. S could not recall the nature of the additional information.

Grievant met with Dr. S for his second fitness for duty evaluation (or re-evaluation). Grievant answered Dr. S's questions and expressed his desire to return to work. Following this second fitness for duty evaluation, Dr. S concluded Grievant was not fit for duty and sent a report to the Agency with her conclusions. Dr. S recommended that Grievant complete eight counseling sessions with a mental health provider and complete a Minnesota Multiphasic Personality Inventory (MMPI) test. Dr. S could not administer the MMPI because it had to be administered by a psychologist. During the hearing, Dr. S could not recall the basis for her conclusion that Grievant was not fit for duty.

On April 27, 2016, Grievant met with Captain who requested that Grievant complete eight counseling appointments through the Employee Assistance Program and the Minnesota Multiphasic Personality inventory (MMPI) test. The Agency expected Grievant to pay for the test.

Grievant completed approximately 13 counseling sessions. Grievant had difficulty finding a provider to administer the MMPI test. He made numerous attempts to find a provider who was capable of administering the test but was unsuccessful. He asked Dr. S for assistance in locating a provider but she did not offer any assistance other than providing him with a telephone number to call. He called the number but was not provided information necessary for him to receive MMPI testing.

On July 2016, Grievant met with Dr. S for his third evaluation. She expected Grievant to have completed the MMPI test so that she could evaluate the test results. Because Grievant had not completed the MMPI test, Dr. S declined to change her assessment that Grievant was unfit for duty.

The Superintendent sent Grievant a letter dated July 25, 2016 informing Grievant:

You will be separated from the Department of State Police effective the close of business October 1, 2016, based on information I have received from our Department psychiatrist, [Dr. S]. The results of your re-evaluation with [Dr. S] were received July 19, 2016, in which she advised that you are still diagnosed as not fit for duty. This is due to [Dr. S's]

original diagnosis and also stemming from the fact that you failed to complete the psychological testing in which she asked for you to complete during your visit with her on March 22, 2016. The recommendation to complete additional psychological testing was also communicated to you by [Captain] when you met with him on April 27, 2016, and also by a follow up email, communicating the expectation requested of you to complete the additional testing.²

Grievant was able to find a provider capable of administering the MMPI test after he had been removed from employment. Grievant was tested by a Licensed Clinical Psychologist (LCP) on September 15, 2016. The LCP concluded:

Results of the personality and emotional functioning tests indicate that there is no evidence to support that [Grievant] is suffering from a major psychiatric illness or personality psychopathology which may hinder his ability to return to his employment with the Virginia State Police. Overall, he seems to be a well-grounded individual who is motivated, emotionally stable, and able to psychologically manage under stress. Based on test results, background information, behavioral observations, and reports, he displays no evidence or mannerisms of psychological distress that would hinder his ability to carry on with his responsibilities as a State Trooper.”³

CONCLUSIONS OF POLICY

General Order 14.10 governs Fitness for Duty assessments. This policy provides:

Purpose:

To describe mental and physical examinations which may be required to ensure an employee is competent to perform the assigned job, and to explain conditions under which these tests may be required.

1. The Superintendent may require mental or physical examinations of an employee by a designated psychiatrist, psychologist, or physician when, in the Superintendent’s estimation, it is to the best interest of the employee or the Department. The purpose of these examinations is to assist the Department in making decisions to determine an employee’s mental and physical fitness to perform his/her job. Beyond this assessment, however, it is the employee’s responsibility to maintain fitness for duty.

² Agency Exhibit 1.

³ Grievant Exhibit 4.

2. The necessity for the mental or physical fitness of duty examination may be based upon:
 - a. Personal observation of general appearance or unusual actions or behavior. ***
 - e. Other information determined reasonable and sufficient by the Superintendent to justify the need for an examination. ***
 - g. If the designated psychiatrist, psychologist, or physician determines the employee is not fit for duty, a recommendation will be provided regarding whether the employee is able to work in a light-duty status or is unable to work at that time. ***

7. Any examinations or tests required by the Superintendent or his/her designee shall be provided at no cost to the employee as listed below.

The Agency's decision to require Grievant to participate in a fitness for duty examination is consistent with General Order 14.10. Grievant made statements consistent with unusual actions or behavior. The Agency's concerns regarding whether Grievant was fit for duty were logical, reasonable, and reflected the Agency's desire to protect Grievant, the Agency, and the citizens of Virginia.

General Order 14.10 requires that a fitness for duty examination be completed by a "designated psychiatrist, psychologist, or physician." Dr. S is not a psychiatrist, psychologist, or physician. Thus, the Agency did not comply with General Order 14.10 and its conclusion that Grievant was unfit for duty is not supported by the evidence presented.

Because the Agency did not comply with General Order 14.10, its removal of Grievant must be reversed. Upon Grievant's reinstatement, the Agency retains discretion regarding whether to evaluate Grievant's fitness for duty with a designated psychiatrist, psychologist, or physician.

It is arguable that the Agency's failure to have Grievant evaluated by a psychiatrist, psychologist, or physician was harmless error. Dr. S had adequate knowledge and experience to complete fitness for duty evaluations and had completed them for the Agency in the past. The Agency did not know Dr. S was not a psychiatrist, psychologist, or physician. This is understandable given that Dr. S was referred to as "doctor" which is consistent with a medical doctor. The Agency represented that it referred Grievant's case to Dr. S because it believed she was qualified under the Agency's policy to complete a fitness for duty examination. The Agency did not intend to exploit or circumvent General Order 14.10, but rather attempted to comply with that policy at all times.

The Hearing Officer cannot conclude that the Agency's failure to have Grievant evaluated by a psychiatrist, psychologist, or physician was harmless error for several reasons. First, Dr. S initially concluded that Grievant was fit for duty. She later

concluded Grievant was unfit for duty based on additional information provided by the Agency. Dr. S could not explain why she first concluded Grievant was fit for duty, what information she received that caused her to change her assessment, and the nature of her conclusion that Grievant was unfit for duty. Second, neither party presented a copy of Dr. S's reports.⁴ The Hearing Officer cannot separately verify Dr. S's conclusions regarding Grievant's fitness for duty. Third, Grievant presented a Confidential Psychological Evaluation reflecting the results of an MMPI-2 test. The Licensed Clinical Psychologist concluded, "[b]ased on test results, background information, behavioral observations, and reports, he displays no evidence or mannerisms of psychological distress that would hinder his ability to carry on with his responsibilities as a State Trooper."

Attorney's Fees

The Virginia General Assembly enacted *Va. Code § 2.2-3005.1(A)* providing, "In grievances challenging discharge, if the hearing officer finds that the employee has substantially prevailed on the merits of the grievance, the employee shall be entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust." Grievant has substantially prevailed on the merits of the grievance because he is to be reinstated. There are no special circumstances making an award of attorney's fees unjust. Accordingly, Grievant's attorney is advised to submit an attorneys' fee petition to the Hearing Officer within 15 days of this Decision. The petition should be in accordance with the EDR Director's *Rules for Conducting Grievance Hearings*.

Back Pay

The Hearing Officer has discretion whether to award back pay in non-disciplinary cases. The Hearing Officer will not award back pay in this case because the Agency's actions were made in good faith and with reasonable concern for Grievant, the Agency, and the public. The Agency afforded Grievant reasonable time to complete the MMPI test but he was unsuccessful in doing so.

Cost of Test

Grievant asserted that the Agency was obligated to pay for the MMPI testing. Grievant did not present the actual cost of the test. The Hearing Officer will not address this issue because there is not sufficient evidence to determine the amount that could be awarded to Grievant.

⁴ The Agency argued it was prevented by law from submitting the report as evidence. This assertion does not change the Hearing Officer's conclusion that no evidence exists upon which the Hearing Officer can review to verify Dr. S's opinions.

DECISION

For the reasons stated herein, the Agency is ordered to **reinstate** Grievant to Grievant's same position at the same facility prior to removal, or if the position is filled, to an equivalent position at the same facility.

APPEAL RIGHTS

You may file an administrative review request within **15 calendar** days from the date the decision was issued, if any of the following apply:

1. If you believe the hearing decision is inconsistent with state policy or agency policy, you may request the Director of the Department of Human Resource Management to review the decision. You must state the specific policy and explain why you believe the decision is inconsistent with that policy. Please address your request to:

Director
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by fax to (804) 371-7401, or e-mail.

2. If you believe that the hearing decision does not comply with the grievance procedure or if you have new evidence that could not have been discovered before the hearing, you may request that EDR review the decision. You must state the specific portion of the grievance procedure with which you believe the decision does not comply. Please address your request to:

Office of Employment Dispute Resolution
Department of Human Resource Management
101 North 14th St., 12th Floor
Richmond, VA 23219

or, send by e-mail to EDR@dhrm.virginia.gov, or by fax to (804) 786-1606.

You may request more than one type of review. Your request must be in writing and must be **received** by the reviewer within 15 calendar days of the date the decision was issued. You must provide a copy of all of your appeals to the other party, EDR, and the hearing officer. The hearing officer's **decision becomes final** when the 15-calendar day period has expired, or when requests for administrative review have been decided.

You may request a judicial review if you believe the decision is contradictory to law. You must file a notice of appeal with the clerk of the circuit court in the jurisdiction

in which the grievance arose within **30 days** of the date when the decision becomes final.⁵

[See Sections 7.1 through 7.3 of the Grievance Procedure Manual for a more detailed explanation, or call EDR's toll-free Advice Line at 888-232-3842 to learn more about appeal rights from an EDR Consultant].

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer

⁵ Agencies must request and receive prior approval from EDR before filing a notice of appeal.



COMMONWEALTH of VIRGINIA
Department of Human Resource Management

DIVISION OF HEARINGS

ADDENDUM TO DECISION OF HEARING OFFICER

In re:

Case No: 10927-A

Addendum Issued: March 30, 2017

DISCUSSION

The grievance statute provides that for those issues qualified for a hearing, the Hearing Officer may order relief including reasonable attorneys' fees in grievances challenging discharge if the Hearing Officer finds that the employee "substantially prevailed" on the merits of the grievance, unless special circumstances would make an award unjust.⁶ For an employee to "substantially prevail" in a discharge grievance, the Hearing Officer's decision must contain an order that the agency reinstate the employee to his or her former (or an objectively similar) position.⁷

To determine whether attorney's fees are reasonable, the Hearing Officer considers the time and effort expended by the attorney, the nature of the services rendered, the complexity of the services, the value of the services to the client, the results obtained, whether the fees incurred were consistent with those generally charged for similar services, and whether the services were necessary and appropriate.

Grievant's Attorney submitted a petition showing 26.6 hours of work related to the grievance hearing. Grievant is allowed reimbursement at a rate of \$131 per hour. Accordingly, Grievant is entitled to reimbursement in the amount of \$3,484.60.

AWARD

The grievant is awarded attorneys' fees in the amount of \$3,484.60.

⁶ Va. Code § 2.2-3005.1(A).

⁷ § 7.2(e) Department of Employment Dispute Resolution (EDR) *Grievance Procedure Manual*, effective August 30, 2004. § VI(D) *EDR Rules for Conducting Grievance Hearings*, effective August 30, 2004.

APPEAL RIGHTS

If neither party petitions the DHRM Director for a ruling on the propriety of the fees addendum within 10 calendar days of its issuance, the hearing decision and its fees addendum may be appealed to the Circuit Court as a final hearing decision. Once the DHRM Director issues a ruling on the propriety of the fees addendum, and if ordered by DHRM, the hearing officer has issued a revised fees addendum, the original hearing decision becomes “final” as described in §VII(B) of the *Rules* and may be appealed to the Circuit Court in accordance with §VII(C) of the *Rules* and §7.3(a) of the *Grievance Procedure Manual*. The fees addendum shall be considered part of the final decision. Final hearing decisions are not enforceable until the conclusion of any judicial appeals.

/s/ Carl Wilson Schmidt

Carl Wilson Schmidt, Esq.
Hearing Officer